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STATE OF WASHINGTON
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NO. 28375-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WASHINGTON EDUCATION ASSOCIATION,

Appellants,

v.

GARY DAVENPORT, MARTHA LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY WOLCOT

Respondents, individually, and on behalf of
all other nonmembers similarly situated.

RESPONDENTS' BRIEF

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I. ASSIGNMENTS OF ERROR

Respondents Gary Davenport et al. (the “Davenport Plaintiffs”) assign no error to the Thurston County Superior Court’s ruling.

II. RESPONDENTS’ STATEMENT OF ISSUES

1. Where a statutory scheme grants a right to an identifiable class of individuals, is it appropriate to imply a private right of action to enforce that right? (Assignments of Error 1, 4)
2. Is an implied right of action precluded by the inclusion of limited express remedies in a statutory scheme? (Assignments of Error 1, 4)
4. Is the issue of prospective application properly before this Court pursuant to RAP 2.5(a) when it was not raised at the trial court?
5. Is there any basis for deviating from the general rule that an appellate decision should be applied retroactively to the parties in the case?
6. Is an aggrieved non-member of a union barred from asserting common law claims of conversion and fraud because the claims are subsumed by the union’s duty of fair representation? (Assignments of Error 3, 4)

7. Does the statute of limitations set forth in a statutory scheme apply to claims brought under that statutory scheme?
8. Is the applicable statute of limitations for state common laws claims of conversion and fraud the federal statute of limitations for a labor complaint, or the state statutes of limitation for conversion and fraud?
9. Where the requirements of CR 23 have been satisfied, did the trial court abuse its discretion in certifying the class?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Plaintiffs Gary Davenport et al. (“Davenport Plaintiffs”) are current and former Washington State public school teachers. They have chosen not to join, or have resigned their membership from, Defendant Washington Education Association (“WEA”). (CP 59) The WEA collects an “agency fee” from nonmembers in the same amount as the dues it collects from WEA members. (CP 424) Davenport Plaintiffs brought this class-action suit to recover the agency fees collected and used by the WEA for political purposes without their affirmative authorization in violation of RCW 42.17.760 for the period 1995-2001. (CP 3-13, 59-79)

In their complaint, Davenport Plaintiffs alleged violation of an implied right of action under RCW 42.17.760, and three tort claims:

conversion, fraudulent concealment and breach of fiduciary duty. (CP 3-13, 59-79) The WEA brought a CR 12(c) motion to dismiss these claims outright and, in the alternative, narrow their scope by claiming the applicable statute of limitations for the tort claims is 6 months. Thurston County Superior Court Judge Daniel Berschauer denied the WEA's motion, except to dismiss the breach of fiduciary claim. Davenport Plaintiffs did not appeal the dismissal of the one claim. The court also ruled that the applicable statute of limitations for the implied right of action was five years pursuant to RCW 42.17.410 and three years for the tort claims. (CP 174)

In a separate hearing, Judge Berschauer certified Plaintiffs' class. These rulings, together with the court's order staying the superior court proceeding, were consolidated into a single order. (CP 172-76)

Prior to the commencement of this suit, the Public Disclosure Commission, through the Attorney General, brought a civil enforcement action in Thurston County Superior Court after completing an investigation of certain allegations that the WEA had violated RCW 42.17.760. State ex rel. Public Disclosure Comm' vs. Washington Educ. Ass'n, Thurston County Superior Ct. No. 00-2-018379, appeal pending (Case No. 2826401-II) (hereinafter PDC v. WEA). During that investigation, the WEA admitted in a written stipulation to "multiple violations of RCW 42.17.760." (CP 69-70)

The State did not seek to recover any of the agency fees collected and used by the WEA in violation of the statute. In announcing the lawsuit, the AG stated in a press release: "The lawsuit is aimed at enforcing the law on behalf of the citizens of Washington and is not intended to recover fees paid by individuals to the WEA." (CP 337)

Following a two-week bench trial, Thurston County Superior Court Judge Gary Tabor issued a Letter Opinion in which he determined that WEA had violated 760. (CP 348-56). The Court assessed the WEA and awarded the State \$200,000 and then doubled it based on its finding that WEA intentionally violated the law. The court entered Findings of Fact and Conclusions of Law and a Permanent Injunction. As the AG did not have standing to represent the individual interests of agency fee payers, Judge Tabor did not order the WEA to return their agency fees. (CP 356) The WEA appealed these rulings and that matter is pending before this Court, PDC v. WEA.

B. FACTUAL BACKGROUND

The WEA is a labor organization that represents public school employees. As a labor organization, the WEA and its local associations are authorized by various statutes to enter into collective bargaining agreements with school districts and community colleges to require employees to pay union dues or agency fees to the WEA. (CP 63) Employees have a choice of becoming members of WEA and paying dues,

or of paying agency shop fees if they do not want to be members. (CP 63) Employees who refuse to pay the dues or fees are dismissed from employment pursuant to the terms of collective bargaining agreements.

Nonmembers, or “agency fee payers”, do not have voting rights or any right to determine the amount or use of the fees they are required to pay to the WEA. At any one time there are approximately 4000 agency fee payers. (CP 61)

The WEA has developed what is often referred to as the “Hudson” process to address the fact that the fees it charges agency fee payers exceed the amount of fees the WEA needs for its collective bargaining activities. (CP 64) These excess fees are referred to in the case law and in the WEA’s “Hudson” process as “non-chargeable expenses.” (CP 64) Non-chargeable expenses include contributions and expenditures to influence an election. (CP 64)

If a nonmember files an objection, the WEA rebates to that person the percentage of their fees that it considers are non-chargeable expenses. (CP 64) Non-members who do not file an objection do not receive a rebate and they pay for the non-chargeable expenses. (CP 64) Non-members must file an objection each year; the WEA does not permit agency fee payers to file standing objections. (CP 64)

IV. ARGUMENT

A. THE TRIAL COURT PROPERLY RULED THAT THERE IS AN IMPLIED RIGHT OF ACTION UNDER CHAPTER 47.17 RCW.

1. The authority of the PDC and the citizen suit provisions of RCW 42.17.400(4) do not preclude a private right of action.

The WEA's first argument is that the Public Disclosure Commission ("PDC") has the "exclusive" authority to enforce the Public Disclosure Act ("PDA") with one limited exception—the citizen suit provision of RCW 42.17.400(4). Brief of Appellant, at 6. This is a gross misstatement of law. Nowhere does RCW 42.17.360—the statute cited by the WEA—mention the "exclusive" authority of the PDC, nor does any other provision in Chapter 42.17 expressly state or even imply any such "exclusivity." RCW 42.17.360 merely describes in general terms the duties of the PDC.

Likewise, no where does the citizen suit provision in RCW 42.17.400(4) preclude a private right of action. Because of the WEA's repeated reliance upon this particular subsection, it is critically important that this Court consider what .400(4) is and what it is not.

The "citizen's action" in .400(4) protects the public from violations of the PDA that partisan officials, the Attorney General, county prosecutors, or an underfunded PDC may be reluctant to prosecute. The statute creates a specific category of enforcer by granting *anyone*—including those who are not personally aggrieved and therefore would not

otherwise have standing—the right to enforce the PDA in certain circumstances. A “citizen’s action,” however, has specific characteristics and limitations. The lawsuit is brought “in the name of the state,” and any “judgment awarded escheats to the State.” RCW 42.17.400(4). Likewise, the state reimburses the successful citizen plaintiff for his or her attorneys fees. *Id.* Clearly, the citizen suit provisions of the statute provide an alternate means of protecting the *public* interest, as the private citizen stands in the shoes of a public enforcer for purposes of the statute. The citizen can receive no private gain by successfully prosecuting such an action.

Nowhere in RCW 42.17.400, however, is there any *prohibition* on a private citizen bringing his or her own lawsuit where such person been personally aggrieved by another’s violation of the chapter, which is the situation in the present case. Davenport Plaintiffs have never maintained that they are attempting to prosecute a citizen suit as that term is defined in RCW 42.17.400(4). Davenport Plaintiffs are simply trying to recover their wages collected and used in violation of RCW 42.17.760. Nothing in RCW 42.17.400 or anywhere else in Chapter 42.17 RCW precludes such a suit.

- 2. The Supreme Court of Washington has already determined that there is an implied right of action.**

In the only case to address private rights of action under 42.17, the State Supreme Court held that an individual may recover private remedies under Chapter 42.17 RCW. Nelson v. McClatchy Newspapers, Inc., 131 Wn.2d 523, 534, 936 P.2d 1123 (1997). In McClatchy, the plaintiff, Sandra Nelson, a newspaper reporter, was transferred to a non-journalistic position at her paper when she refused to follow her employer's ethical prohibition on political activism. Id. at 527-29. The plaintiff did not follow the procedure of RCW 42.17.400(4)¹ and simply filed a private lawsuit in her own name, alleging a violation of RCW 42.17.680. RCW 42.17.680 prohibits an employer from discriminating against an employee on the basis of his or her political activity. The newspaper argued that the statute did not create a private right to be free from discrimination: "[Defendant] argues if creation of such a broad right was intended, why was it quietly slipped into campaign finance reform" instead of "labor or other civil rights laws." Id. at 533.

The Washington Supreme Court rejected the newspaper's argument, holding that the statute did create a private cause of action related to campaign finance reform because "employers may not disproportionately influence politics by forcing their employees to support their position" Id. at 534. Similarly, here the WEA requires the

¹ In May, 2001, Plaintiffs' counsel, Steven T. O'Ban, requested copies of all citizen action complaints filed with the Attorney General and PDC since 1995. The Attorney

agency fee payers to pay fees equivalent to dues which are automatically deducted from the teachers' wages and transferred to the WEA, which spends a portion the fees to influence politics, disproportionately influencing politics.

In deciding for the newspaper, the court held that the plaintiff's right "is established by the statute." Id. at 543. The Court referred to Nelson's "statutory...cause of action" Id. at 526, and "her state law entitlement" under RCW 42.17.680(2). Id. at n.1. It ultimately dismissed her case because the statute unconstitutionally infringed on the newspaper's First Amendment rights. However, the court was *forced* to decide the constitutional issue *because* it held that RCW 42.17.680 created a private right. "Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds." Tunstall ex rel. Tunstall v. Bergeson, 141 Wn. 2d 201, 210, 5 P.3d 691 (2000). McClatchy, therefore, demonstrates that the procedures of RCW 42.17.400(4) do not apply to private lawsuits brought under Chapter 42.17 RCW. The statute at issue in McClatchy, RCW 42.17.680, was enacted by the same initiative as the statute at issue in the present case. 1993 Wash. Laws, ch. 2 §§ 8, 16.

General and PDC provided copies of all citizen action complaints, none of which involved or referred to Sandra Nelson or anyone on her behalf. (CP 339, 342)

The WEA may argue on reply that the McClatchy court never undertook the analysis of Bennett v. Hardy, 113 Wn.2d 912, 784 P.2d 1258 (1990) for finding an implied right of action (which is discussed below). While the McClatchy court did not explicitly lay out the Bennett factors, it implicitly recognized an implied right in the PDA. The court could have avoided the constitutional question holding that no private right of action existed under the Bennett test and dismissed the case. Rather, in undertaking the lengthy statutory analysis and finding an enforceable right in RCW 42.17.680, the McClatchy court by definition recognized a means of enforcing that right. To hold that McClatchy did not imply a right of action in Chapter 42.17 RCW would be to overrule McClatchy.

In light of McClatchy and that nowhere does RCW 42.17 prohibit a private lawsuit, Defendant's argument that the "citizen's action" in RCW 42.17.400(4) is the only means of relief must fail.

3. The trial court correctly ruled that there is an implied private right of action under Bennett.

The trial court properly ruled RCW 42.17.760 creates an implied private right of action. Such a right is necessary to protect the interests and rights of individual fee payers protected by the statute who suffer a direct monetary loss in violation of their rights. The standard for finding an implied private right of action is as follows:

A cause of action will be implied if a) the plaintiff is within the class for whose “especial” benefit the statute was enacted; b) the legislative intent, explicitly or implicitly, supports creating or denying a remedy; and c) implying a remedy is consistent with the underlying purpose of litigation.

Wingert v. Yellow Freight Sys., 104 Wn. App 583, 591, 13 P.3d 677 (2000) (citing Bennett, 113 Wn.2d at 920-21). The careful application of these factors can lead to only one result: the trial court properly held that the Davenport Plaintiffs stated a valid cause of action.

a. Davenport Plaintiffs are within a group of people the statute was designed to protect.

The first of the three factors is whether Plaintiffs are within a group of people the statute was designed to protect. The statute explicitly identifies the class of individuals and their interests that it seeks to protect: “an individual who [is] not a member” of the union who pays “agency shop fees.” Furthermore, it empowers the nonmember, not the public, with the right to withhold affirmative authorization. On its face, the statute seeks to protect the rights of individual agency fee payers.

It is not surprising then that the history of RCW 42.17.760 confirms it was intended to protect the interests of agency fee payers. A person cannot be forced to support the political views of another. Any statute that requires employees who are not union members to pay fees to the union to finance the union’s political activities, violates the First Amendment. Aboud v. Detroit Board of Education, 43 U.S. 209, 234-235,

97 S. Ct. 1782 52 L. Ed. 2d. 261 (1977). The ability to charge non-members any fees at all is a statutory privilege, not a right. With that privilege, as noted in Steele v. Louisville and Nashville R.R. Co., 323 U.S. 192, 198, 65 S. Ct. 226, 89 L. Ed. 173 (1944), a union that is an exclusive bargaining agent, “is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power . . .” The exercise of this power by states, in any measure, has an impact on the employee’s First Amendment interests. It is permitted only because of States’ compelling interest in workplace harmony. Abood, 431 U.S. at 254.

Abood holds that the First Amendment protects nonmembers who object to the use of their fees for purposes unrelated to collective bargaining. RCW 42.17.760 extends that protection to all nonmembers.

RCW 42.17.760 is virtually identical to the Model Laws prepared by the Council on Governmental Ethics Laws from 1991², which pre-dates Initiative 134’s passage. (CP 344-46). The two enactments are as follows:

² The Council on Governmental Ethics Laws (COGEL) traces its origins to December 1974 when a group of newly formed federal and state ethics agencies met to begin coordination on ethics laws issues. It began as a grant project of the National Municipal League, in part to establish an Ethics Clearinghouse to provide information to agencies on ethics laws. A major project was the drafting of “model laws” for state and federal agencies to address campaign finance issues, conflicts of interest, and personal finance disclosure. COGEL eventually took over some of the League’s functions in this regard in 1978. Membership is drawn from governmental agencies and interested individuals. Its website is www.cogel.org.

A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or political expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

RCW 42.17.760.

A labor organization shall not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political action committee, unless affirmatively authorized by the individual.

COGEL Model Law §112(2).

The comment to that Model Law confirms its purpose to protect individual fee payers:

An agency shop fee is an involuntary payment. Therefore, use of the fees for political purposes without consent abridges the individual's freedom of association.³

Comment to COGEL Model Law §112(2). (CP 346) RCW 42.17.760 was intended to protect the First Amendment rights of all agency fee payers. Both its history and plain wording leave no doubt agency fee payers are within a group the statute was designed to protect.

The WEA confuses the Bennett tripart test by arguing that to determine whether "Plaintiffs are of the class for whose benefit RCW 42.17.760 was enacted, one must look to the purposes of Chapter 42.17"

³ The courts have permitted states to create greater protection of the First Amendment rights of non-members. For example, thirteen states have enacted "Right to Work Laws" which excuse non-members from paying any agency fee. RCW 42.17.760, while not forbidding the collection of an agency fee, protects agency fee payers from being forced to contribute to the union's political activity without their consent.

Brief of Appellant, at 10. The WEA mixes the first element with the third. The inquiry is whether from a plain reading of 760 it appears the voters created a class in which the Plaintiffs are included. Undeniably, the statute protects the agency fees of nonmembers and their constitutional interest not to be coerced to fund the union's political agenda.

The Washington Supreme Court in McClatchy implied a private right of action under a similar statute, RCW 42.17.680. The Court ruled that the statute enacted as part of campaign finance law to prevent an organization from "disproportionately influenc[ing] politics by forcing [individuals] to support [the organization's] position" created a private right of action. McClatchy, 131 Wn2d at 534. While the statute indirectly protects the public, it directly protects the individual. In McClatchy, Sandra Nelson's employment status was a substantial and tangible right, far outweighing the benefit to the general public system. Likewise, misuse of agency fees, while of general interest to the public, directly impacts the interests of the individual agency fee payer whose wages are withheld and used to support political causes without the individual's consent. Obviously, as held in the enforcement action brought by the Attorney General, if the statute were followed and an agency fee payer declined to give his or her consent, wages would be returned to the fee payer.

That a statute benefits the public at large is no impediment to a court finding an implied right of action. See Wingert, 104 Wn. App. 583. In Wingert, the court created an implied right of action in wage and hour regulations, noting that WAC 296-196-092 was designed to protect individuals even though the enabling statute, Chapter 49.12 RCW, was enacted for “the welfare of the State of Washington.”

Judge Tabor, while imposing a \$400,000 penalty on the WEA to protect the public interest, recognized the individual interests of the agency fee payers: “While the amount spent for ‘political purposes’ will be a component of the formula for assessing what portion of the agency fees are to be credited or returned to the agency fee payers, that amount need not be quantified for this court to rule as its initial finding that such fees are, indeed, being spent in violation of the statute.” (CP 352).

Plaintiffs are members of a class the statute was intended to protect.

b. The statutory scheme supports creating a remedy.

Because the statute protects a specific class of individuals, it implicitly grants a remedy to those individuals. “[T]he Legislature would not enact a statute granting rights to an identifiable class without enabling members of that class to enforce those rights.” Bennett, 113 Wn.2d at 921. Here, members of the identifiable class—agency fee payers—have no means of enforcing their rights without an implied private right of action,

and, therefore, the second Bennett factor is satisfied. See Wingert, 104 Wn. App. at 591-92 (rights would not be created if an implied remedy were not intended). The WEA's arguments to the contrary are unpersuasive.

1) The statute's inclusion in Chapter 42.17 RCW does not foreclose an implied private right.

The WEA first argues that the statute's inclusion within Chapter 42.17 RCW precludes a private right, based upon the policy statement in the chapter and two additional reasons. Brief of Appellant, at 11-12. All three arguments fail.

The WEA neglects to quote the entire policy statement. While Initiative 134 may not specifically identify agency fee payers in its policy statement, both the policy, RCW 42.17.620, and the findings, RCW 42.17.610, refer to increasing the power of "individuals" in the political process and reducing the disproportionate influence of financially strong organizations. Just as the McClatchy court held that Initiative 134's purpose is furthered where "employers may not disproportionately influence politics by forcing their employees to support their position or by attempting to force political abstinence on politically active employees," 131 Wn.2d at 534, so too this purpose is furthered by preventing labor organizations from extracting political contributions from agency fee

payers, who, after all, are obligated to pay an agency fee as a condition of employment.

2) An explicit remedy does not preclude an implied private right of action.

The WEA's other two arguments are also baseless. Both center on the WEA's oft-repeated⁴ but blatantly inaccurate statement that the inclusion of an explicit remedy—no matter how limited—precludes an implied private right of action. This is simply not the state of the law, as stated succinctly by the Wingert court:

Finally, [defendant] contends that the Legislature, in enacting chapter 49.12 RCW, provided explicit remedies for specific violations and criminal penalties for general violations. Hence, its failure to explicitly create a private cause of action for failure to provide rest periods implies its intention not to create a remedy. The Bennett court, faced with a similar argument, disagreed. Like chapter 49.12 RCW, chapter 49.44 RCW also contains explicit civil remedies in some situations, and criminal penalties for general violations. Still, the court held that an implied right of action exists

Wingert, 104 Wn. App. at 593. Likewise the McClatchy court held that the plaintiff had stated a claim even in the presence of the RCW 42.17.400 enforcement mechanism.

Viewed in light of the above statement of law, the WEA's first argument—that the statute's placement in Chapter 42.17 precluded a

⁴ Brief of Appellants, at 6, 8, 11, 12, 13, and 14.

private right of action—can be readily disposed of, as it simply contradicts Bennett, Wingert, and McClatchy.

The WEA's second argument—that application of the statute of limitations from Chapter 42.17 RCW precludes a private right of action—obfuscates the trial court's ruling and the Davenport Plaintiffs' position. Contrary to the text of WEA's brief, Davenport Plaintiffs' have never argued that "RCW 42.17.400(4) does not apply to RCW 4[2].17.760," Brief of Appellants, at 12. Rather, Davenport Plaintiffs have simply stated that RCW 42.17.400(4) was enacted by voters to permit a citizen the right to protect the public interest when partisan officials fail to do so. Nothing in RCW 42.17.400(4) or any other part of Chapter 42.17 RCW provides that a "citizen's action" is the only remedy for violations of the chapter. To hold that the presence of RCW 42.17.400(4) in the same chapter as RCW 42.17.760 precludes a private right of action would be to overrule McClatchy and Bennett, something this Court lacks the authority to do.

3) An action brought by the state or a private citizen under RCW 42.17.400 does not provide an adequate remedy.

The WEA also argues that either the Attorney General or a citizen plaintiff proceeding under RCW 42.17.400(4) could seek private restitution for aggrieved individuals such as the Davenport Plaintiffs. Brief of Appellant, at 13. There are two significant flaws with this argument.

First, contrary to the WEA's statements, there is no provision for private restitution in the case of a citizen's action brought under RCW 42.17.400(4). That subsection provides that "the judgment awarded shall escheat to the state," and makes no mention of any other civil remedies. Certainly, if state officials had declined to file suit against the WEA and Davenport Plaintiffs had filed a citizen action under RCW 42.17.400(4), the WEA would be in court arguing that the plaintiffs would not be entitled to private relief.

The second flaw in the WEA's argument is that the Attorney General explicitly declined to seek private relief, stating that it did not have the power to do so. When the Attorney General filed suit against the WEA for violation of RCW 42.17.760, the AG stated in a press release: "The lawsuit is aimed at enforcing the law on behalf of the citizens of Washington and is not intended to recover fees paid by individuals to the WEA." (CP 337). During the case, the Assistant Attorney General told the court that "[t]his is a civil penalty case, this is not a case on behalf of the employees affected seeking their money in return," and noted that "it's beyond the authority of the Attorney General to represent the 4,000 or so private citizens out there who have been affected by [the WEA's violation of RCW 42.17.760]." (CP 381).

The trial court likewise declined to involve itself in the issue of private restitution. In issuing a \$400,000 penalty against the WEA, the

court stated that the “court is not addressing what, if any monies or damages any individual or group of fee payers would be entitled to.” (CP 352).

Because neither the Attorney General nor the court contemplated private restitution, does that mean that Davenport Plaintiffs could file a citizen action under RCW 42.17.400(4) seeking different relief? Certainly the WEA would say no, and that is probably a proper interpretation of .400(4).

Accordingly, *in this very instance*, the WEA’s purported “restitution to a private individual,” Brief of Appellant, at 13, was neither sought nor awarded, and it illustrates the need for an implied private right of action. Because there is an identifiable class with rights and the statutory scheme permits, as the WEA concedes, private restitution, then the court must “enabl[e] members of that class to enforce those rights.” Bennett, 113 Wn.2d at 921. In this case, the only means of vindicating the private rights is an implied remedy to recover the actual funds of Plaintiffs.⁵

⁵ WEA may argue, as it did unsuccessfully in the PDC v. WEA, that Chicago Teacher’s Union v. Hudson and its progeny, offer a means by which agency fee payers may vindicate their rights. However, agency fee payers monies are used for political purposes unless they are informed of their “Hudson rights” and send a written objection by a deadline imposed by the WEA. Judge Tabor already ruled on Summary Judgment that RCW 42.17.760 “requires an affirmative authorization from agency fee payers [as opposed to a passive failure to object] before WEA may collect or use such fees for “political purposes.” (CP 350). Agency fee payer rights under RCW 42.17.760 are not, therefore, protected by Hudson. The fact that as many as 4000 agency fee payers do not object (only about 200 object from year to year) and pay the equivalent of full union dues

Furthermore, the section in the PDA regarding remedies, RCW 42.17.390, is broadly written and implies any and all remedies are available: "In addition to any other remedies provided by law" Nowhere is there any language in RCW 42.17 purporting to limit remedies to those directly protecting the public interest.

c. Implying a private right of action is consistent with the statute.

Relying on RCW 42.17.010, Defendant incorrectly asserts that the only purpose served by the statute is public disclosure. However, the purpose of RCW 42.17.760 is set forth in Initiative 134. 1993 Wash Laws. ch. 2. The findings and intent of Initiative 134 go beyond RCW 42.17.010. Among other purposes, the intent of I-134 was to "[e]nsure that *individuals* and interest groups have fair and equal opportunity to influence elective and governmental processes" and "reduce the influence of *large organizational contributors*." RCW 42.17.610. (emphasis added) By preventing a labor organization from collecting and using agency shop fees for unauthorized political purposes and returning those fees to individuals (through compliance with the statute or enforcement via a private right of action), RCW 42.17.760 is consistent with and indeed furthers the statutory intent of reducing the influence of the WEA, while increasing the opportunity of individual agency fee payers to voluntarily

is further evidence that RCW 42.17.760 is a separate and more effective means of

contribute to political causes. Obviously, by its own language, RCW 42.17.760 deals with “reduc[ing] the influence of large organization contributions,” not public disclosure.

This is the same purpose furthered by the private right of action recognized by the Washington Supreme Court in McClatchy, 131 Wn.2d at 534:

Taken as a whole, the provision in question means that employers may not disproportionately influence politics by forcing their employees to support their position or by attempting to force political abstinence on politically active employees.

The WEA also argues again, at page 14 of Brief of Appellant, that the people or the Legislature would have created a private remedy had either intended one, this time offering the private remedies of RCW 42.17.340 (enforcing public records requests) as its justification. This argument fails to gain any momentum even through repetition. Again, it contradicts McClatchy, Bennett, and Wingert, all of which implied a private right of action in the presence of other explicit remedies. Moreover, the presumption that there is no remedy where the Legislature did not explicitly create one nullifies the entire “implied private right” doctrine of Bennett and its progeny. The courts should *imply* a private right where the Bennett test is met; not only when the legislature explicitly created one, as WEA argues repeatedly.

protecting nonmembers’ First Amendment rights.

Similarly, Defendant's reliance upon McCandlish Electric, Inc. v. Will Construction Co., 107 Wn. App. 85, 25 P.3d 1057 (2001) is misplaced. In McCandlish, the court held that implying a private right of action by a subcontractor against a general contractor in the competitive bidding statute would work *against* the public interest by "subjecting taxpayers to further penalties when they are already injured by paying too high a price under an illegal contract." Id. at 97. Moreover, the aggrieved bidder did enjoy the right to sue to enjoin the illegal contract. Id. Here, the fee payer's interest is aligned with the public interest, and the fee payer has no other means of restitution for WEA's violation of the statute. Accordingly McCandlish is distinguishable.

4. Federal law is both inapt and easily distinguishable.

The WEA further relies upon the recent U.S. Supreme Court decision in Gonzaga University v. Doe, ___ U.S. ___, 122 S. Ct. 2268, ___ L.Ed.2d. ___ (2002) for the proposition that there can be no private right of action implied in RCW 42.17.760. But Gonzaga is readily distinguishable in a number of ways.

First, the Gonzaga decision was issued by a federal court relying on federal law and has no precedential effect here. In re Detention of Turay, 139 Wn.2d 379, 402, 986 P.2d 790 (1999) (federal court interpretation of federal law not binding on issue of state law even where federal and state rules are identical).

Second, the federal test used in Gonzaga for determining whether there is a cause of action under the Family and Educational Rights Privacy Act, 20 U.S.C. § 1232g (“FERPA”), and 42 U.S.C. § 1983 is not the same test as that used for determining whether there is a private right of action in Washington State. While the test used by courts in our state was borrowed from the older federal case of Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct 2080 (1975), see Bennett v. Hardy, 113 Wn.2d 912, 920, 784 P.2d 1258 (1990), the test set forth in Cort is not the current federal test. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 23-24, 100 S.Ct. 242, 249, 62 L.Ed.2d 146 (1979) (focussing solely on congressional intent); Thompson v. Thompson, 484 U.S. 174, 189, 108 S.Ct. 513, 521, 98 L.Ed.2d 512 (1988) (Scalia, J., concurring) (noting that Cort v. Ash was overruled). Thus the Gonzaga result is based upon an application of a different test than that applied by our state courts.

Third, even if the test used in Gonzaga—where the court focused solely on whether Congress intended to create a federal right—were applied, RCW 42.17.760 is distinguishable from FERPA. FERPA addresses the policy of the institution and not the individual rights of students. Gonzaga, 122 S. Ct. at 2278. As the Court noted, “The focus [of the statute] is two steps removed from the interests of individual students.” Id. at 2277. RCW 42.17.760, however, is not directed to the policies of the labor organization, but to the specific use of the individual non-

member's dues and his right to give or withhold authorization. As noted above, the legislative history demonstrates that the statute was enacted to protect the individual rights of agency fee payers. See Section IV.A.3.a, at 11. Accordingly, WEA's reliance upon Gonzaga is misplaced.

5. A decision to create an implied right of action must be applied retroactively.

The WEA next argues that the trial court's decision, if upheld, should be applied prospectively, yet fails to cite any factual basis or legal authority for its argument. Brief of Appellant, at 18-19.

This Court may dispose of this argument without further inquiry, as the WEA never raised the issue of prospective application at the trial court level and is therefore barred from raising it here. RAP 2.5(a).

Nevertheless, should this Court review the issue of prospective-only application, the WEA has no basis for its request. The general rule is that decisional law is given retroactive effect to the parties in the case. Bradbury v. Aetna Cas. & Sur. Co., 91 Wn.2d 504, 507, 589 P.2d 785 (1979). The WEA attempts to depart from this general rule on the basis that it justifiably relied upon the state of the law in stipulating to violations of RCW 42.17.760 with the Public Disclosure Commission. Yet the WEA fails to cite any case law upon which it relied. This failure is immediately fatal to the WEA's argument. In determining whether to apply a decision prospectively only, "courts customarily focus on whether particular

persons have relied justifiably *upon the overruled decision.*” Haines v. Anaconda Aluminum Co., 87 Wn.2d 28, 34, 549 P.2d 13 (1976). There being no prior decision to overrule, there was nothing for the WEA to rely upon. Moreover, the *only* case dealing with an implied right of action in Chapter 42.17 RCW—McClatchy—favors the Davenport Plaintiffs’ position, not the WEA’s, and was decided in 1997, three years before the WEA’s stipulation with the PDC. Finally, the WEA’s vague claim of reliance is further belied by the court’s finding in PDC v. WEA that the WEA made no effort to comply with the statute whatsoever. (CP 354)

B. THE TRIAL COURT CORRECTLY DETERMINED THAT DAVENPORT PLAINTIFFS HAVE VIABLE TORT CLAIMS.

- 1. The conversion claim is well founded because agency fee payers retained ownership in the political portion of their fees.**

The WEA argues that the trial court erred in refusing to dismiss Davenport Plaintiffs’ conversion claim, stating that it had title to the funds improperly collected from agency fee payers.

WEA was never entitled to these funds because the statute which authorizes agency shop fee provisions in collective bargaining agreements, RCW 41.59.100 does not authorize employers to withhold “a fee equivalent to dues” for political purposes. In effect, “dues” for purposes of RCW 41.59.100, read together with RCW 42.17.760, does *not* include

the monies collected from agency fee payers for political purposes. As noted by Judge Tabor in the PDC v. WEA case:

It is clear to this Court that everyone interpreted 100 only as to dues, and “dues” as I use that term and I think as should be applied to the legal definition of dues, would not involve monies collected from nonunion members’ part of agency fees that were for political purposes. Thus, 100 does not really address the issue that 760 addresses.

(CP 377) Accordingly, the political portion of the agency fee was never the WEA’s “property” to begin with. Since the enactment of RCW 42.17.760, this portion belonged to the agency fee payers unless and until they authorized their collection and use for WEA’s political purposes.

Moreover, even if the WEA was entitled to receive a fee in the amount of dues, the unauthorized use of funds can constitute conversion. Restatement (Second) of Torts § 228 (1963) (“One who is authorized to make particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated.”). WEA’s misuse of Davenport Plaintiffs’ funds for political purposes, without their authorization, amounts to conversion, assuming the WEA was somehow justified in collecting the full agency fee.

Defendant’s reliance on Murray v. Laborers Union Local No. 324, 55 F.3d 1445 (1995) is misplaced. In Murray, the union was awarded arbitration costs against one of its members because the member filed a

frivolous grievance. Id. at 1449. When the member refused to pay, the union took his subsequent dues payment and applied it to the arbitration award that the member legally owed to the union. Id. The court held that the member had no title to the money that he had sent to the union and therefore could not claim conversion.

Here, however, the WEA is expressly prohibited by statute from using agency shop fees for political purposes without the individual agency fee payer's authorization. In order to comply with the statute, either the WEA would have to collect a lower agency fee from the fee payers who do not give the statutory authorization, or it would have to return the fees collected without authorization. (CP 352, 355) Clearly, agency fee payers retained the right to control their funds to prevent the support of WEA's political activity. That right was violated repeatedly and intentionally. (CP 353-54). Plaintiffs' conversion claim is well-founded and must be upheld.

2. WEA's duty of fair representation does not subsume Davenport Plaintiffs' conversion and fraudulent concealment claims.

WEA asserts that because it has a fiduciary duty to fairly represent member and fee payers, those members and fee payers cannot bring claims against WEA for conversion and fraudulent concealment. Brief of Appellant, at 23. WEA reaches this conclusion based on its (incorrect) assertion that Allen v. Seattle Police Officers' Guild, 100 Wn.2d 361

(1983) establishes a ceiling on a union's duty to its members. Brief of Appellant, at 25 ("the [c]ourt necessarily has held that no greater duty is owed to members"). But Allen says no such thing.

Allen dealt with "the issue of whether a union's financing of a legal challenge to the employer's affirmative action program violates the union's duty to represent fairly all of its members." 100 Wn.2d at 363. There was no allegation of any other cause of action (e.g., conversion or fraud). Id. at 365 (plaintiffs sued alleging breach of duty to represent). There is no discussion in the case about preemption of other causes of action. There is no discussion in the case to indicate that the duty of fair representation is the maximum duty owed by the union. Allen is simply not relevant to the case at bar.

WEA also improperly relies upon United Steelworkers of America v. Rawson, 495 U.S. 362, 110 S. Ct. 1904 (1990). Rawson dealt with the issue of federal preemption of state law *as it related to the collective bargaining agreement* in a lawsuit by members in a *federally regulated private-sector* labor union. Rawson is therefore inapplicable for several reasons. First, as a state public-sector labor union, the WEA is not governed by federal law. The WEA concedes this point. Brief of Appellant, at 30-31. Thus, the issue of federal preemption of state law is irrelevant. This is a critical point, as the extensive quotation from Brief of

Appellants, at pages 27-28, comes in the context of federal preemption of state tort claims as is not relevant to the present case.

Second, Rawson dealt with a union's duty to its members based solely on its collective bargaining agreement. Notably, the Rawson Court explicitly conceded that a greater duty could be placed upon the union in some circumstances. "We have never held . . . that . . . a labor union is *prohibited* from voluntarily assuming additional duties" Id. at 373 (emphasis in original). While, under federal law, the duty of fair representation may subsume state torts as they relate to general obligations in the collective bargaining agreement, specific duties may be assumed by the union in some circumstances. Id. at 374 (employee who claims union owes a greater duty must point to specific obligations enforceable against the union). In this case, there is a more specific duty—that created by RCW 42.17.760.

Third, Rawson holds only that "mere negligence . . . would not state a claim for breach of the duty of fair representation" 495 U.S. at 372-73. The Court was never faced with, and did not decide, whether a claim of fraud or conversion would be included within the duty of fair representation. Accordingly, nothing in Rawson requires this Court to reverse the trial court.

C. THE APPROPRIATE STATUTE OF LIMITATIONS IS FIVE YEARS FOR THE STATUTORY CLAIMS AND THREE YEARS FOR THE COMMON LAW CLAIMS.

The WEA's only assignment of error on the statute of limitations is not specific as to where exactly the trial court purportedly erred in its ruling on the appropriate statute of limitations. The WEA states in its assignment of error that "[t]he trial court erred by holding that there is a five-year statute of limitations for its implied right of action." Brief of Appellant, at 1. Yet at pages 28 and 29 of the Brief of the Appellants, the WEA appears to argue that it is only appealing the trial court's decision about the statute of limitations with respect to the "conversion and fraudulent concealment" claims. Davenport Plaintiffs are left to guess as to exactly where the WEA's appeal lies. Without the benefit of a clear argument to which to respond, Davenport Plaintiffs nevertheless address each of the applicable statutes as follows:

1. The appropriate statute of limitations for the statutory claim is five years.

Chapter 42.17 RCW provides a specific statute of limitations to enforce rights created by that chapter: five years. RCW 42.17.410. The trial court properly held that the five year limitations period therefore applied to Davenport Plaintiffs' statutory claims. (CP 174). The WEA offers no logical basis for its argument that RCW 42.17.410 does not apply in the case of an implied right of action, Brief of Appellants, at 35.

RCW 42.17.410 is neither expressly nor implicitly limited to suits brought under RCW 42.17.400, but to “*any action* brought under provisions of this chapter.” As Davenport Plaintiffs seek to enforce a specific statutory right contained within the chapter, the chapter’s statute of limitations applies.

The WEA also states without argument that a six-month statute of limitations applies even to the statutory claim.⁶ The unsupported assertion is plainly incorrect. The WEA’s sole argument for imposing a six-month statute of limitations on the common law claims is based upon several leaps of logic, discussed below, that, even if followed, would have no relevance to the statutory claim. The WEA does not argue that the “duty of fair representation” applies to the statutory claim,⁷ thus there is no basis for applying the statute of limitations for a federal labor claim to a state campaign finance claim.

2. The appropriate statute of limitations for the common law claims is three years.

WEA urges the Court to borrow the six-month statute of limitations used by the U.S. Supreme Court in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), a case involving alleged breach of the duty of fair representation. DelCostello, however, is distinguishable on at least two grounds.

⁶ Brief of Appellant, at 34 (“As argued above, Appellant believes that the most appropriate statute of limitations is six months and that it is applicable to *all of Respondents’ claims*”) (emphasis added)

⁷ Brief of Appellant, at 23-28.

First, Davenport Plaintiffs' claims for conversion and fraud are not claims for breach of the duty of fair representation. Each is a separate, well-recognized common law claim for which Washington's three-year statute of limitations applies. RCW 4.16.080(2), (4). As discussed in Section IV.B.2, supra, at 28, the duty of fair representation does not preclude or subsume these common law torts. Therefore it would be absurd to apply a federal labor-law statute of limitations to state common law claims for which a limitations period is explicitly provided by statute.

Second, assuming for the sake of argument that a duty of fair representation limitations period were to apply, DelCostello deals with federal law, which the WEA concedes does not even apply to this case. Brief of Appellant, at 30. Even in the context of a state duty of fair representation claim, "most courts deciding [the issue of the limitations period for a DFR claim] have found [DelCostello] irrelevant to public sector unions and simply looked to state law for the limitation period." Tracy A Bateman, What Statute of Limitations Applies to State Law Action by Public Sector Employee for Breach of Union's Duty of Fair Representation, 12 A.L.R. 5th 950, § 2 (1993 & Supp. 2000). Indeed, the entire DelCostello decision was necessary only because, as the Court explained, "there is no federal statute of limitations expressly applicable to this suit." 462 U.S. at 158. Thus, the Court had "to 'borrow' the most suitable statute or other rule of timeliness from some other source." Id.

Here, there is no such need to borrow, as the appropriate statutes of limitation are explicitly provided by statute, RCW 4.16.080.⁸

D. THE TRIAL COURT PROPERLY CERTIFIED THE CLASS

The trial court properly certified Davenport Plaintiffs' complaint against the WEA alleging violations of RCW 42.17.760 and conversion as a class action, finding that all requirements of CR 23 were satisfied.⁹ The shared offenses the WEA committed against the plaintiffs and members of the class justified class certification.

The WEA contends that the prerequisites of commonality, typicality, and adequacy of representation, CR 23(a)(2)-(4), are lacking¹⁰ because the named plaintiffs have diverse reasons for becoming agency fee payers, some no longer work as teachers, were never full-time teachers, and/or were involved in the class settlement in Leer v. Washington Educ. Ass'n, 172 F.R.D. 439, 446-47 (W.D. Wash. 1997) (hereinafter "Leer"). Brief of Appellant, at 35-43. Even if these factual

⁸ Interestingly, even the plaintiffs in Allen sued for activities taken by their labor organization almost two years prior to filing the suit, indicating that a six-month limitations period was not applied to the duty of fair representation claim. Allen v. Seattle Police Officers Guild, 32 Wn. App. 56, 60-62, 645 P.2d 1113 (1982), aff'd, 110 Wn.2d 361, 670 P.2d 246 (1983) (lawsuit filed in July 1978 over actions dating back to August 1976; no limitations bar applied).

⁹ "The class plaintiffs' seek to represent consists of all public school employees who, since September 1995 to the present, are or were nonmembers paying an agency shop fee to defendant WEA without receiving a reduction or refund for the amount the union spent on political contributions and expenditures without their authorization" Plaintiffs' Motion for Class Certification ("Motion for Class") at 2.

¹⁰ The WEA does not contest that plaintiffs' have satisfied CR 23(a)(1) (Numerosity) and CR 23(b)(3).

assertions were true for all named plaintiffs, which they are not, it does not effect their suitability to be class representatives. All named plaintiffs and all class members have suffered the same wrong at the hands of the WEA, thereby warranting class certification.

The WEA's challenge to the trial court's certification of the plaintiff classes has a high burden to overcome.

A trial court's decision to certify a class is discretionary The court's decision will not be overturned absent *a manifest abuse of discretion* A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. A trial court's class certification will be upheld if it appears from the record that the court considered all of the criteria of CR 23.

Lacey Nursing Center, Inc. v. Department of Revenue, 128 Wn.2d 40, 47, 905 P.2d 338 (1995) (emphasis added) (quotations and citations omitted).

1. Named Plaintiffs Are Members of the Plaintiff Class

Under the five year statute of limitations provided for by RCW 42.17.410 and adopted by the trial court, no named plaintiff is timed barred. Between September 1995 and the present, every named plaintiff has at differing times paid agency fees to the defendant WEA without receiving a reduction or refund for the amount the union spent on political contributions and expenditures, except plaintiff Walt Pierson who received a refund for the 2000-01 school year only. The named plaintiffs all claim that the WEA spent a portion of their agency fees on politics without

securing the required affirmative authorization. The WEA never disputes these facts. Thus, every named plaintiff fits comfortably within the parameters of the class and the protection of RCW 42.17.760.

2. The commonality requirement has been satisfied

CR 23(a)(2) requires that “there are questions of law or fact common to the class.” This criterion is satisfied because each plaintiff and member of the class was a nonunion employee, had an agency fee deducted from his wages by the WEA pursuant to a collective bargaining agreement, and did not affirmatively authorize the use of their deducted agency fees on political expenses nor did they receive a rebate of their fees. Commonality was found to be satisfied by similar factors in George v. Baltimore City Public Schools, 117 F.R.D. 368, 370 (D. Md. 1987) and Damiano v. Matish, 644 F. Supp. 1058, 1059 (W.D. Mich. 1986).¹¹

The WEA contends that commonality may not be present because “there is a question of law as to whether some of the class affirmatively authorized use of their fees for so-called political expenses.” Brief of Appellant, at pg. 37. This “question” cannot bar class certification, as it is black letter law that certification of a class is to be undertaken with no

¹¹ The only distinction between George and Damiano and the case at issue is that the rights violated in George and Damiano were grounded in the constitution, while the rights of the plaintiff class are based in statute and common law. This distinction is inconsequential, as it does not detract from commonality. Moreover, CR 23 is identical to Rule 23 of the Federal Rules of Civil Procedure. Id. at 46-47 (citing DeFunis v. Odegaard, 84 Wn.2d 617, 529 P.2d 438 (1974)).

consideration of the merits of the claims. Washington Educ. Ass'n v. Shelton School Dist. No. 309, 93 Wn.2d 783, 790, 613 P.2d 769 (1980). Furthermore, if the merits were considered, the Thurston County Superior Court has already held that the WEA intentionally used agency fees in violation of RCW 42.17.760 in fiscal school years 1995-96, 1996-97, 1997-98, 1998-99, and 1999-2000. (CP 350-53).

The WEA further contends that the diversity of reasons plaintiffs opted to become agency fee payers creates a range of factual issues that defeats commonality. Brief of Appellant, at 37-38. The union relies on Gilpin v. AFSCME, 875 F.2d 1310 (7th Cir. 1988), cert. den'd, 493 U.S. 917 (1989),¹² to support its position that plaintiffs have not met the commonality requirement because some class members may be hostile to unions on political or ideological grounds. Id. at 39.

Why each plaintiff or public school employee chose to become an agency fee payer is utterly irrelevant to both class certification and this litigation in general.¹³ What is relevant is that both the named plaintiffs

¹² Defendants also cite Kidwell v. Transportation Communications Int'l Union, 946 F.2d 283, 305 (4th Cir. 1991) and Pilots Against Illegal Dues (PAID) v. ALPA, 938 F.2d 1123, 1134 (10th Cir. 1991), which merely quoted or cited Gilpin without further elaboration. By contrast, "the Ninth Circuit has not denied class certification based on the types of reasoning and arguments used in Gilpin." Murray v. Local 2620, District Council 57 AFSCME, 192 F.R.D. 629, 633 (N.D. Cal. 2000); see also Blackie v. Barrack, 524 F.2d 891, 909 (9th Cir. 1975) (Speculative conflicts of interest at the outset of a case were not sufficient to deny certification of a class); Kayes v. Pacific Lumber Co., 51 F.2d 1449, 1464 (9th Cir. 1995) (Plaintiff's alleged animosity toward the defendant would actually further the zealous prosecution of the case, not hinder it).

¹³ Even if it were relevant, the range of diversity among the plaintiffs support their being adequate class representatives for an allegedly diverse class of agency fee payers.

and all members of the class chose to become agency fee payers. As such, they have a right to the procedural and substantive protections of RCW 42.17.760. By allegedly violating their rights under this statute, the WEA has engaged in a common course of conduct toward the entire agency fee payer class, which satisfies commonality. See King v. Riveland, 125 Wn.2d 500, 519, 886 P. 2d 160 (1994) (even if “different facts and different questions of law existed within a potential class, the fact that the defendant was engaged in a ‘common course of conduct’ in relation to all potential class members made certification appropriate.”)¹⁴

Moreover, unlike Gilpin, Davenport Plaintiffs do not seek full restitution of all agency fees collected. Instead, only a return of the political monies used by the defendants in violation of RCW 42.17.760 is sought. Judge Zilly of the United States District Court for the Western District of Washington addressed the same arguments made by the WEA:

Gilpin is not dispositive here and provides an insufficient basis in and of itself for the blanket denial of class

¹⁴ See also King, 125 Wn.2d at 519 (“Complete unanimity of position and purpose is not required among members of a class in order for certification to be appropriate.”); Smith v. University of Washington Law School, 2 F. Supp.2d 1324, 1342 (W.D. Wash. 1998) (“Subpart (a)(2)’s requirement that there be common questions of law common to the class is met by the alleged existence of common discriminatory practices. The actions of the defendant need not affect each member of the class in the same manner.”); Zimmer v. City of Seattle, 19 Wn. App. 864, 870, 578 P. 2d 548, 552 (1978) (“The fact that some members of a class might not wish to benefit by the relief sought does not impair the legitimacy of a class action.”); Baird v. California Faculty Ass’n, 166 L.R.R.M. (BNA) 2491, 2000 WL 1028782, *5 (E.D. Cal. 2000) (court rejected union’s argument that plaintiffs’ ideological opposition to the union renders them unable to represent potential class members who do not share the same ideology because the proposed class members were alleged to suffer an identical injury – having an agency shop statute enforced against them in violation of the Constitution).

certification” where “the remedies sought by the subclass are not punitive in nature, as they were in Gilpin . . . [where] the plaintiffs sought restitution of *all* fees paid Because the plaintiffs seek only damages in the amount of the excess fees paid, the concerns about financially punishing or ruining the union are not present here.

Leer v. Washington Educ. Ass’n, 172 F.R.D. 439, 446-47 (W.D. Wash. 1997) (emphasis in original).

3. The typicality argument is satisfied

The claims of the named plaintiffs are typical of the certified class. Both the named plaintiffs and the members of the plaintiff class can claim that the WEA did not secure the affirmative approval required by RCW 42.17.760 before spending their agency fees on political expenses. The WEA never disputes this. There are no significant differences amongst the named plaintiffs and the class in this regard. Accordingly, CR 23(a)(3) is satisfied. See Smith, 2 F. Supp.2d at 1342 (“The claims of the named plaintiffs need not be identical to the claims of the class. They need only to arise from the same remedial and legal theories.”)(citation omitted); see also Hohe v. Casey, 128 F.R.D. 68, 70 (M.D. Pa. 1989) (Rule 23(a)(3) of the Federal Rules of Civil Procedure satisfied because plaintiffs and the class are nonmembers, have had agency fees deducted, and allege resulting violations of their legal rights); George, 117 F.R.D. at 371 (same).

4. Adequacy of representation is satisfied

The named plaintiffs can fairly and adequately protect the interests of the class as required by CR 23(a)(4). There is no antagonism between the interests of the named plaintiffs and the class regarding the subject matter of the litigation. All differences between the named plaintiff and the class that the WEA speculates to exist are extraneous to their shared interest in the legal protection granted by Washington State law RCW 42.17.760.

The WEA contends that Gary Davenport and Susanna Simpson are not adequate class representatives because they no longer have an economic interest in the collective bargaining representation provided by the WEA since they no longer work for the public school system. Brief of Appellant, at 40-41.¹⁵ It is further alleged that Martha Lofgren is an inadequate class representative because her status as a substitute teacher raises representational issues different from those of other employees. Id. at 40. Davenport Plaintiffs' suit has nothing to do with the representation provided, or not provided, by the WEA. The named plaintiffs are not running for exclusive bargaining representative. Rather, they seek to

¹⁵ The WEA also alleges that the small amount of fees paid by Mr. Davenport during his employment in the public school system make him unfit to be a class representative. "The contention that the plaintiff must have a large financial interest in the litigation has also been rejected." 1 Newberg on Class Actions § 3.27, at 3-147 (3d. Ed. 1992) ("One Plaintiff with Small Claim Satisfies Adequate Representation Test"); see also id. § 3.16, at 3-87 (Most courts have refused to even consider the argument that differences in damages make a plaintiff's claim atypical, or have rejected the contention outright.)

represent those nonmember employees who had their agency fees taken and spent by the WEA on politics in violation of RCW 42.17.760. All people who allegedly suffered this wrong—including Mr. Davenport, Mrs. Simpson, and Mrs. Lofgren—have the same interest in receiving redress for the monies illegally taken from them, regardless of their past or current employment status.

The WEA argues that Martha Lofgren is not an adequate representative because her opposition to agency fees is based on certain ideological beliefs. At issue is the WEA's duty *under RCW 42.17.760* to secure a nonmember's approval *before* expending any portion of his or her agency fee on politics. The reasons why class members chose not to provide the WEA with affirmative authorization to spend their agency fees *on politics is immaterial*. See Hohe, 128 F.R.D. at 70 (“That some [nonunion] class members may not at this time object to the specific amount of money withheld from their paychecks does not make their position antagonistic to that of the named plaintiffs.”); see also Horton v. Goose Creek Independent School Dist., 690 F.2d 470, 487 (5th Cir. 1982) (in challenge to constitutionality of canine “sniff” searches in schools, the fact that significant numbers of students and parents approved of searches was not sufficient to show antagonism sufficient to defeat the class); George, 117 F.R.D. at 371-72 (same); Zimmer, 19 Wn. App. at 870 (same).

Defendant claims presence of Davenport Plaintiffs' counsel Mssrs. Chappell and O'Ban "in this litigation hallmarks the internal conflict of interests that should have precluded them from representing the class," citing Gilpin and Kidwell. Brief of Appellant, 41-42. The courts in Leer, 172 F.R.D. at 441-42, 453 (certifying Mssrs. Chappell and O'Ban as class counsel), and Murray have rejected such arguments.

Defendants attack plaintiff's counsel as inadequate because the Right to Work Legal Defense Foundation (the "Foundation") represents people who are hostile to unions. Defendants cite Kidwell and Gilpin, in which the court held that the Foundation did not provide adequate legal counsel. As discussed previously, these cases differ factually from this action and do not bind this court. In Gilpin, the court held that the Foundation was not adequate counsel because the class was seeking punitive damages while some members of the class only wanted to get their money back and not destroy the union. Gilpin, 875 F.2d at 1313. *This holding has nothing to do with the Foundation's ability to represent the class*, but is based on an alleged conflict within the class itself Since the Gilpin decision, two district courts within the Ninth Circuit and a district court in Michigan have found the Foundation to be adequate counsel. See Cummings [v. Connell], 1999 WL 1256772, at *5 [E.D. Cal. 1999]; Leer, 172 F.R.D. at 439 (no discussion of adequacy of counsel and class certified); Bromley v. Michigan Educ. Ass'n, 178 F.R.D. 148, 162 (E.D. Mich. 1998) As discussed in Bromley, plaintiff's counsel are bound by the same ethical and procedural rules as defense counsel. Id. The Foundation's political activities are wholly divorced from this case. This court does not find this to be a sufficient basis for disqualification of the Foundation as counsel.

Murray, 192 F.R.D. at 635-36 (emphasis added). The same rationale applies to Mr. O'Ban and the Evergreen Freedom Foundation.

5. The settlement in Leer does not prevent class certification.

The WEA argues that Walt Pierson, and similarly situated class members, should be barred by the settlement agreement in Leer from representing or being a member of the plaintiff class. Brief of Appellant, at 42. The clause of the Leer settlement relied on by the WEA states:

5. Binding Effect

a. . . . This Stipulation shall fully and finally resolve all claims that were or could have been asserted by any plaintiff or class member with respect to defendants agency fees for the school years 1994-95 through 1997-98, and shall determine the procedures and methods of calculation to be used in the future to fix, assess, and collect the agency fees of defendants and their local affiliates in the state of Washington.

(CP 476-77).

The WEA's contention that the Leer settlement affects this action is unfounded. First, the constitutional causes of action in Leer are completely different from the claims alleged in this action, and thereby not affected by the terms of the settlement. Leer involved two constitutional claims against the WEA and its affiliated unions. See 172 F.R.D. at 442-43. This action does not involve any constitutional claims, only statutory claims concerning whether WEA violated the requirements of RCW 42.17.760 and the appropriate damages. As United States District Court Judge Burgess found in rejecting WEA's removal effort in this case, the causes plead herein would not be appropriate in a Leer-type constitutional case.

The plaintiff's [sic] complaint pleads causes of action for violation of RCW 42.17.760, conversion, breach of fiduciary duty and fraudulent concealment. These causes of action all relate to circumstances concerning the WEA's obligations to agency fee payers, some of which are described by the case Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986). However, the Washington State statute cited above creates an additional burden on the WEA which is not prohibited by or contained within the notices required by Hudson. Plaintiffs seek determinations under state law, and federal law is only tangential to the questions presented by this lawsuit. Therefore, it is hereby ORDERED THAT THIS CASE BE REMANDED TO STATE COURT.

(CP 511-12).

Second, only the first Leer subclass challenging the Hudson notice could potentially overlap with the plaintiff class here, but the portion of the settlement applicable to first subclass cannot preclude a claim under RCW 42.17.760. The two subclasses certified in Leer were defined as:

- (1) *Adequacy-of-Notice Claim*: All nonmember public school district employees who at any time from July 1, 1994 through the 1996-1997 school year were or are represented exclusively for purposes of collective bargaining by Defendants and were subject to demands for or collections of agency fees for the WEA and any of its affiliates.
- (2) *Chargeability Claims*: All nonmember employees who at any time from July 1, 1994 through the 1996-1997 school year were required to pay an agency fee to the WEA or NEA under a compulsory unionism agreement with a public employer authorized by RCW 41.59.060 & 41.59.100 and [who objected to, and challenged the calculation of, the WEA- determined fee by selecting "option 3" as described in the Notice sent to nonmember employees by the WEA.]

Leer 172 F.R.D. at 441-42, as amended by Order, Jeff L. Leer, et. al. v. Washington Education Association, No. C96-1612Z (W.D. Wash. July 31, 1998) (amended portion shown in brackets). By definition, class members here could not have simultaneously been part of the second (chargeability) Leer subclass.¹⁶ Only the first Leer subclass could potentially overlap with the class here since it includes nonobjecting agency fee payers.

Simultaneous membership in the first Leer (notice) subclass could not preclude a nonmember's participation in this action. The Leer settlement only "resolve[d] all claims that were or *could have* been asserted by any plaintiff or *class member* with respect to defendants' agency fees" for a specific four-year period." (CP 476-77) (emphasis added). Members of first (notice) subclass could not have maintained the chargeability claim of the second (chargeability) subclass, as employees who do not object to a union's agency fee do not suffer constitutional damages from erroneous chargeability calculations. Hence, that portion of the Leer settlement addressing agency fee computation is inapplicable to members of the first subclass, as their causes of action did not, and could not have, addressed that issue. Therefore, even if the Leer settlement somehow covered RCW 42.17.760 claims, it would not preclude such

¹⁶ The second Leer subclass included only objecting nonmembers who received rebates from the WEA. The class certified here specifically excludes those agency fee payers who received "a reduction or refund from the amount the union spent on political contributions and expenditures." (CP 61).

actions by employees who were only members of the first (notice) subclass.

Moreover, the first (notice) subclass in Leer was limited to claims for injunctive, declaratory, and nominal damages. Id. at 453. The plaintiff class here seeks only damages, attorneys fees and costs. (CP 67)

[T]he general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events. In fact, every federal court of appeals that has considered the question has held that a class action seeking only declaratory or injunctive relief does not bar subsequent individual suits for damages.

Hiser v. Franklin, 94 F.3d 1287, 1291 (9th Cir. 1996) (quotations omitted); see also Fortner v. Thomas, 983 F.2d 1024, 1030-32 (11th Cir.1993); 18A Charles A. Wright et al., Federal Practice & Procedure § 4455 (2d ed. 2002) (collecting cases). Therefore, simultaneous membership in the first Leer subclass would not preclude a class member's claim for damages in this class action suit even if the causes of action were the same.

Third, chronological restraints on the subclasses certified in Leer and the class settlement do not significantly overlap with that of the plaintiff class here. The time frame for the plaintiff class here extends from March 1995 through the end of August 2000. (CP 67). The subclasses certified in Leer covered "from July 1, 1994 through the 1996-97 school year." Leer 172 F.R.D. at 441-42. They did not include future years or future agency fee payers. Under the five year statute of

limitations governing RCW 42.17.760, the 1996-97 school year would be the only complete school year in which the classes could overlap. Thus, even if the Court were to hold that the Leer settlement somehow applied, it would only apply to a limited number of agency fee payers—the claims of agency fee payers during the 1996-97 school year. There would be no effect on the common law causes of action governed by the three-year statute of limitation. Thus, only claims for the 1996-97 school year could possibly fall within the chronological range of the Leer settlement.

Accordingly, certification of the plaintiff class is proper. The trial court correctly found that all requirements of CR 23 were satisfied. The WEA failed to demonstrate that the trial court's certification of the plaintiff class was a "manifest abuse of discretion" warranting reversal. Lacey, 128 Wn.2d at 47.

V. CONCLUSION

Because Davenport Plaintiffs have stated valid claims based upon violation of RCW 42.17.760 and common law and because the trial court did not abuse its discretion in certifying the class, Davenport Plaintiffs respectfully request that the trial court's ruling be affirmed in its entirety and the case be remanded for trial.

DATED this 30 day of August, 2002.

Respectfully submitted,

ELLIS, LI & MCKINSTRY PLLC

A handwritten signature in black ink, appearing to read 'N. L. Taylor', written over a horizontal line.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

WASHINGTON STATE EDUCATION
ASSOCIATION,

Petitioner,

vs.

GARY DAVENPORT, MARTHA
LOFGREN, WALT PIERSON,
SUSANNAH SIMPSON, and TRACY
WOLCOT,

Respondents.

NO. 28375-1-II

DECLARATION OF SERVICE

I declare that I caused to be served a true and correct copy of the

Respondents' Brief on August 30, 2002, to the following persons:

VIA LEGAL MESSENGER

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DECLARATION OF SERVICE - 1

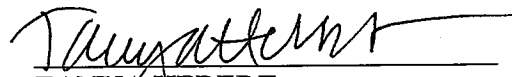
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I declare under penalty of perjury of the laws of the State of
Washington that the foregoing is true and correct.

DATED this 30th day of August, 2002, at Seattle, Washington.


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